



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 1, 2012

Ms. Jessica Scott  
Counsel for the City of Sunset Valley  
Scanlan, Buckle & Young, P.C.  
602 West 11th Street  
Austin, Texas 78701-2099

OR2012-17522

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 469702.

The City of Sunset Valley (the "city"), which you represent, received a request for three categories of information: (1) the personnel file of a named former officer with the Sunset Valley Police Department (the "department"); (2) documents relating to the named officer not within his personnel file; and (3) all letters, memoranda, e-mails, faxes, text messages, or other documents between any members of the department, any other city department, any city employees, or elected city officials pertaining to the named officer for a specified time period. We understand the city will release documents responsive to categories two and three of the request upon the requestor's response to a cost estimate for that information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.115, 552.130, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the submitted information in the named former officer's personnel file was the subject of a previous request for information, as a result of which this office

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<sup>1</sup>Although you raised section 552.108 of the Government Code in your initial brief to this office, you make no arguments to support this exception. Therefore, we presume you no longer assert this exception. See Gov't Code §§ 552.301, .302.

issued Open Records Letter No. 2012-00825 (2012). In Open Records Letter No. 2012-00825, this office determined certain information in the same former officer's personnel file must be withheld under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code and under section 552.101 of the Government Code in conjunction with common-law privacy. However, you explain the former officer whose information was at issue in Open Records Letter No. 2012-00825 and is at issue in the present request, has since died. As such, we find that circumstances have changed and the city may not rely upon Open Records Letter No. 2012-00825 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address the exceptions you have raised for the submitted information.

Next, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You state the city received the request for information on August 13, 2012. Because you do not inform this office the city was closed for business any of the days at issue, we find the city's ten-business-day deadline was August 27, 2012. While you raised sections 552.101, 552.102, and 552.137 within the ten-business-day time period as required by subsection 552.301(b), the city did not raise sections 552.115 and 552.130 until after the ten-business-day deadline had passed. Thus, with respect to sections 552.115 and 552.130, the city failed to comply with the requirements mandated by section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because sections 552.115 and 552.130 can provide compelling reasons to overcome the presumption of openness, we will address your arguments under these exceptions, as well as your timely-raised exceptions.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses laws that make criminal history record information (“CHRI”) confidential. CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990). *See generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, CHRI does not include driving record information. *See id.* § 411.082(2)(B). We note because the laws governing the dissemination of information obtained from NCIC and TCIC are based on both law enforcement and privacy interests, the CHRI of a deceased individual that is obtained from a criminal justice agency may be disseminated only as permitted by subchapter F of chapter 411 of the Government Code. *See* ORD 565 at 10-12. Upon review, we find the information we have marked constitutes confidential CHRI that the city must withhold under section 552.101 in conjunction with chapter 411 of the Government Code and federal law.<sup>2</sup>

Section 552.101 of the Government Code also encompasses section 611.002 of the Health and Safety Code. Section 611.002 provides “[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.” Health & Safety Code § 611.002(a). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). Sections 611.004

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<sup>2</sup>As our ruling is dispositive, we need not address your argument against disclosure of this information.

and 611.0045 provide for access to mental health records only by certain individuals. *See id.* §§ 611.004, .0045; ORD 565. These sections permit disclosure of mental health records to a patient, a person authorized to act on the patient's behalf, or a person who has the written consent of the patient. *See* Health & Safety Code §§ 611.004-.0045. Upon review, we find the information we have marked constitutes mental health records that are confidential under section 611.002 of the Health and Safety Code. The city may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. *See id.* § 611.004(a)(5) (professional may disclose confidential information to patient's personal representative if patient is deceased). However, we find none of the remaining information you have marked consists of communications between a patient and a professional or records of the identity, diagnosis, evaluation, or treatment of a patient that were created or maintained by a professional. Accordingly, the city may not withhold any of the remaining information under section 552.101 on this basis.

Section 552.101 of the Government Code also encompasses medical records made confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990).

Pursuant to the MPA, medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. The medical records of a patient who is now

deceased may only be released on the signed written consent of the decedent's personal representative. *See id.* § 159.005(a)(5). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); ORD 565 at 7. Upon review, we find the information we have marked constitutes confidential medical records under the MPA. In this instance, the patient at issue is now deceased. Accordingly, if the requestor provides proper consent in accordance with the MPA for any of the marked medical records, they must be released. If the requestor does not provide proper consent, then the marked medical records must be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. *See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history).* We note that privacy is a personal right that lapses at death, and, thus, common-law privacy is not applicable to information that relates to only a deceased individual. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984); H-917 (1976); Open Records Decision No. 272 (1981).

The submitted information consists of the deceased former employee's personnel file and includes, among other items, information pertaining to the former employee's insurance elections. Generally, we find that the decision to obtain life insurance is a private, financial decision that is excepted from disclosure under common-law privacy pursuant to section 552.101. As previously noted, the right to privacy lapses at death. *See Moore*, 589 S.W.2d at 491. Thus, that individual's right to privacy has lapsed, and the information relating to him may not be withheld on that basis. However, the beneficiaries of an insurance policy have a separate right to privacy. Therefore, information that would reveal a beneficiary's identity is protected by common-law privacy. We note the requestor is one of the living individuals whose privacy rights are implicated. Thus, the requestor has a special right of access to his own information that would ordinarily be withheld to protect his privacy interests. *See Gov't Code § 552.023(a)-(b) (governmental body may not deny access to person or person's representative to whom information relates on grounds that information*

is considered confidential under privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Accordingly, the city may not withhold the requestor's own information under section 552.101 in conjunction with common-law privacy. Upon review, we find the information we have marked is information pertaining to a living individual other than the requestor that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city must withhold the information we have marked pursuant to section 552.101 in conjunction with common-law privacy. We find you have failed to demonstrate any of the remaining information you seek to withhold is information pertaining to a living individual other than the requestor that is highly intimate or embarrassing and not of legitimate public concern. As such, the city may not withhold any of the remaining information under section 552.101 on the basis of common-law privacy.

You also claim portions of the remaining information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, we note section 552.102(a) protects the privacy interests of individuals, and the right to privacy lapses at death. *See Moore*, 587 S.W.2d at 491. Upon review, we find none of the remaining information is information pertaining to a living individual that is excepted under section 552.102(a); thus none of the remaining information may be withheld under section 552.102(a).

The information at issue contains a birth certificate, which you claim is protected under section 552.115 of the Government Code. Section 552.115(a) provides that "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from the requirements of Section 552.021[.]" Section 552.115 only applies to information maintained by the bureau of vital statistics or local registration official. The city is not the Bureau of Vital Statistics or a local registration official; therefore, the city may not withhold the submitted birth certificate under section 552.115. *See Open Records Decision No. 338* (1982).

We note some of the remaining information is subject to section 552.117 of the Government Code.<sup>3</sup> Section 552.117(a)(2) excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code to keep such information confidential. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481* (1987), 480 (1987), 470 (1987).

Section 552.117(a)(2) protects a peace officer's personal pager number if the pager service is not paid for by a governmental body. Open Records Decision No. 670 at 6 (2001); *cf.* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to section 552.117 of the Government Code not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). As previously discussed, the submitted information pertains to a former city peace officer that is now deceased. Because the protection afforded by section 552.117 includes "current or former" officials or employees, the protection generally does not lapse at death, as it is also intended to protect the privacy of the employee's family members. However, because the protection of social security numbers under section 552.117 is intended to solely protect the privacy of the employee, it lapses at death. *See Moore*, 589 S.W.2d at 489; *see also* Attorney General Opinions JM-229; H-917. Accordingly, the city must withhold the information we have marked under section 552.117(a)(2). The city may not withhold the pager number we have marked if the pager service is paid for by a governmental body.

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country and information related to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130. However, we note section 552.130 is designed to protect the privacy of individuals, and the right to privacy expires at death. *See Moore*, 589 S.W.2d at 491; *see also* ORD 272 at 1. The information you have marked is driver's license information that pertains to a deceased individual. Accordingly, the city may not withhold this information under section 552.130.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note the purpose of section 552.137 is to protect the privacy interests of individuals, and because the right of privacy lapses at death, the e-mail address of a deceased individual may not be withheld under section 552.137. *See Moore*, 589 S.W.2d at 497. Therefore, the city may not withhold the deceased individual's e-mail address you have marked under section 552.137.

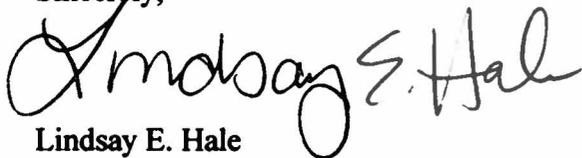
In summary, the city: (1) must withhold the CHRI we have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code and federal law; (2) may only release the mental health records we have marked in accordance with sections 611.004 and 611.0045 of the Health and Safety Code; (3) must withhold the medical records we have marked under section 552.101 of the Government Code in conjunction with the MPA unless the requestor provides the city with proper consent in accordance with the MPA; (4) must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy; and (5) must withhold the information we have marked under section 552.117(a)(2) of the

Government Code, but may only withhold the pager number we have marked if the pager service is not paid for by a governmental body. The city must release the remaining information.<sup>4</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/tch

Ref: ID# 469702

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>The information being released in this instance includes the requestor's own information that is confidential with respect to the general public. See Gov't Code § 552.023(a); ORD 481 at 4. Accordingly, if the city receives another request for this information from an individual other than this requestor, the city must again seek a ruling from this office.